UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

L. THOMAS WEAVER, Appellant, v. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER DE07529104081I1 DATE: NOV 23 1992

Jerre W. Dixon, Esquire, Dixon & Snow, P.C., Denver, Colorado, for the appellant.

John A. Werner, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has timely petitioned for review, and the agency has timely cross petitioned for review, of the November 15, 1991 initial decision that mitigated the agency's purported 30-day suspension of the appellant to a 15-day suspension. For the reasons discussed below, we DENY the appellant's petition for review for failure to meet the criteria for review set forth at 5 C.F.R. § 1201.115, GRANT the agency's cross petition for review, REVERSE the initial decision's determination that the appeal is within the Board's

jurisdiction under 5 U.S.C. chapter 75, AFFIRM the initial decision's determination that the appeal is within the Board's jurisdiction as an independent right of action under 5 U.S.C. § 1221(a), VACATE the initial decision's mitigation of the agency's action, otherwise AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DENY the appellant's request for corrective action.

BACKGROUND

The agency proposed the appellant's removal from the GS-13 position of Criminal Investigator with its Office of Inspector General, based on six charges of misconduct. *See* Appeal File (AF), Volume 2, Tab 4, Subtab 4g. Following his consideration of the appellant's oral and written replies to the charges, *see id.*, Subtabs 4d-4f, the agency's deciding official sustained only two of the charges,[1] and reduced the penalty to a 30-day suspension. *Id.*, Subtab 4c.

The appellant filed a timely petition for appeal with the Board. Following a 2-day hearing, the administrative judge issued an initial decision in which he: (1) Assumed jurisdiction over the action on two distinct bases -- (a) as an adverse action under 5 U.S.C. chapter 75, and (b) as an independent right of action under 5 U.S.C. § 1221(a); (2) sustained only one of the two charges; (3) found the appellant's affirmative defenses of reprisal for whistleblower

[1] These charges are identified as Charges 1 and 2 in the initial decision. *See* Initial Decision (ID) at 3, 8. The deciding official sustained Charge 2 only in part. *See* AF, Volume 2, Tab 4, Subtab 4c at 3.

activity and laches not supported; and (4) mitigated the 30-day suspension to a 15-day suspension. AF, Volume 1, Tab 28.

The appellant has petitioned for review, asserting that the administrative judge erred by sustaining Charge 1, and by not sustaining his claims of reprisal for his whistleblower activity and laches. Petition for Review File (PFRF), Tab 1. The agency has timely responded in opposition to the appellant's petition for review, and has also cross petitioned for review, asserting that the administrative judge erred by not sustaining Charge 2. PFRF, Tab 3. The appellant has timely responded in opposition to the agency's cross petition for review, and has asserted, therein, the additional claim that the administrative judge erred by finding that a nexus existed between his charged misconduct and the efficiency of the service.[2] PFRF, Tab 6.

ANALYSIS

Jurisdiction

Just prior to the hearing below, the agency raised the issue of subject-matter jurisdiction to the administrative

---

[2] Additionally, on February 6, 1992, the Clerk of the Board issued an order in which he: (1) Ordered the appellant to submit a copy of his Exhibit U, which, inadvertently, had not been included in the record; and (2) afforded the parties the opportunity to address the issue of subject-matter jurisdiction. *See* PFRF, Tab 5; *infra* n.5. In response, the appellant has submitted a copy of his Exhibit U, PFRF, Tab 7, and has also submitted jurisdictional argument. PFRF, Tab 8. The agency has not responded to the Clerk's order.

judge.[3] *See* Initial Decision (ID) at 2. Specifically, the agency queried whether an appealable "suspension" action had been imposed on the appellant under the circumstances of the case. *Id.* That is, although the decision notice stated that the agency action was to "suspend" the appellant from duty "for 30 days without pay," the decision notice then added the following:

> However, because you are presently in a non-duty status receiving Workers' Compensation benefits as a result of a job-incurred injury, you will continue to receive those benefits without interruption.

AF, Vol. 2, Tab 4, Subtab 4c at 5.

The administrative judge assumed jurisdiction over the action under 5 U.S.C. chapter 75 as an adverse action, finding that, although the appellant lost no pay as a result of the agency's action, the action was, nevertheless, an appealable "suspension" because it was "punitive in nature." ID at 2. This was error.[4]

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by

---

[3] The issue of subject-matter jurisdiction may be raised at any time in the course of the Board's proceeding. *See, e.g., Miller v. Department of the Treasury*, 47 M.S.P.R. 223, 227 (1991).

[4] An agency's action may be deemed "punitive in nature," as, for example, a suspension of 14 days or less, but still not be appealable to the Board as an adverse action under 5 U.S.C. chapter 75. *See, e.g., Oates v. United States Postal Service*, 49 M.S.P.R. 571, 572-73 (1991).

statute or regulation.[5] *See* 5 U.S.C. § 7701(a); *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588-89 (1989). The Board does not have jurisdiction over all actions that are alleged to be incorrect, but rather it only has jurisdiction that is provided in pertinent statutes and regulations. *See Marren v. Department of Justice*, 49 M.S.P.R. 45, 51 (1991).

A "suspension" is defined as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." 5 U.S.C. § 7501(2); *Henry v. Department of the Navy*, 902 F.2d 949, 954 (Fed. Cir. 1990); *Schoeffler v. Department of Agriculture*, 50 M.S.P.R. 143, 146 (1991). Here, inasmuch as the appellant was already in a non-duty, non-pay status[6] at the time of the agency's action, he was not

[5] In pertinent part, the Clerk of the Board's February 6, 1992 order afforded the parties the opportunity to address the issue of subject-matter jurisdiction, specifically, (a) whether a "suspension" appealable to the Board as an adverse action under 5 U.S.C. chapter 75 may be imposed upon an employee such as the appellant herein, who was already in a non-duty, non-pay status (albeit he was receiving Office of Workers' Compensation Programs benefits), at the time that the agency imposed its action, and (b) whether a "personnel action" within the meaning of 5 U.S.C. § 2302(a)(2)(A) occurred in this appeal. PFRF, Tab 5. In response, the appellant submitted, inter alia, argument in support of a finding of Board jurisdiction in the above-described circumstances. PFRF, Tab 8. The agency has not responded to the Clerk's order.

[6] Under 5 U.S.C. § 7511(a)(4), the term "pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee." *See McLaughlin v. United States Postal Service*, MSPB Docket No. BN07529010188 (Aug. 18, 1992). The Federal Employees' Compensation Act, 5 U.S.C. § 8116(a), prohibits an employee receiving workers' compensation benefits from receiving any other type of remuneration from the Federal government. *See Gay v. United States Postal Service*, 47 M.S.P.R. 1, 3 (1990). Thus, the appellant was legally precluded from receiving "pay" while he

"placed" into that status and deprived of his duties and pay thereby. *See Marren*, 49 M.S.P.R. at 50 (the employee was not "placed" into a non-duty, non-pay status by the agency, and thus was not constructively suspended, where his failure to report to work was voluntary); *Kuhn v. Federal Deposit Insurance Corporation*, 48 M.S.P.R. 393, 398 (1991) (the placement of the employee on administrative leave did not constitute a constructive suspension), *aff'd*, 954 F.2d 734 (Fed. Cir. 1992) (Table).[7] We find, therefore, that the appellant did not receive a "suspension" and, thus, that he was not entitled to appeal the action under 5 U.S.C. chapter 75. *See* 5 U.S.C. § 7501(2); *Henry*, 902 F.2d at 954; *Schoeffler*, 50 M.S.P.R. at 146; *Marren*, 49 M.S.P.R. at 50.

The administrative judge also assumed jurisdiction, however, under an alternative, proper basis -- i.e., as an independent right of action under the Whistleblower Protection Act of 1989.[8] *See* 5 U.S.C. § 1221(a);[9] ID at 3 n.1. We find

---

was also receiving workers' compensation benefits, irrespective of the agency's purported "suspension" action. *Cf. Schoeffler*, 50 M.S.P.R. at 146 (it was not possible for the agency to retroactively suspend an employee who had worked during the period in question).

[7] *Cf. Perry v. United States Postal Service*, 46 M.S.P.R. 456, 460 (1990) (the agency's denial of light duty status and the employee's consequent, voluntary absence from duty did not constitute the "placement" of the employee into a constructive furlough status), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991) (Table); *Maltzman v. United States Postal Service*, 44 M.S.P.R. 239, 241-42 (1990) (the employee's absence from duty for medical reasons was voluntary and thus he was not placed by the agency into a nonpay status).

[8] The appellant first sought corrective action from the Special Counsel, and exhausted those proceedings. *See* PFRF,

that, in addition to receiving the proposed removal notice, which, although not effected, was a proposed "personnel action" under 5 U.S.C. §§ 2302(a)(2)(A)(iii) and 2302(b)(8) and 5 C.F.R. §§ 1209.2(a)(b)(1) and 1209.4(a)(3), the appellant also ultimately received an *effected* "personnel action." A "personnel action" means, inter alia: "An adverse action under chapter 75 of title 5, United States Code *or other disciplinary or corrective action.*" 5 C.F.R. § 1209.4(a)(3) (emphasis supplied). This definition covers disciplinary or corrective actions that do not constitute adverse actions under 5 U.S.C. chapter 75. *See Gergick v. General Services Administration*, 49 M.S.P.R. 384, 392 (1991).

We find that a purported 30-day "suspension" action that is recorded in an employee's official personnel file, but not actually effected, such as the one at bar, is akin to, at least, a "disciplinary or corrective" letter of reprimand for alleged misconduct, *see id.*, and thus constitutes a "personnel action" under the above statutory and regulatory provisions.

Tab 7, Appellant's Exhibit U; *Shillinger v. Department of Labor*, 47 M.S.P.R. 145, 151 (1991).

[9] This statutory provision permits an individual right of action in certain reprisal cases as follows:

> Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

5 U.S.C. § 1221(a).

We conclude, therefore, that the administrative judge properly assumed jurisdiction over this appeal as an independent right of action under 5 U.S.C. § 1221(a). *See Gergick*, 49 M.S.P.R. at 390-91; *Horton v. Department of the Navy*, 47 M.S.P.R. 475, 478-79 (1991); ID at 3 n.1; PFRF, Tab 7.

The appellant's petition for review.

We find that the appellant's petition for review, and his response to the agency's cross petition for review, merely reiterate arguments that were presented to and considered by the administrative judge below, without demonstrating error on the part of the administrative judge. As such, his mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The agency's cross petition for review.

I. Interim relief.

The administrative judge ordered the agency to provide interim relief to the appellant as of November 15, 1991, the date of the issuance of the initial decision, in accordance with the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2)(A), if a petition for review were filed. *See* ID at 15. Along with its cross petition, the agency submitted evidence of its attempt at compliance with the administrative judge's interim relief order. *See* PFRF, Tab 3 at 3 and Enclosures 1, 2. We need not determine the

sufficiency of the agency's evidence of interim relief in this case, however, because we find that the administrative judge erred by ordering interim relief under the circumstances of this appeal. *See McIntire v. Federal Emergency Management Agency*, MSPB Docket No. NY0752920033-I-1, slip op. at 3-4 (November 23, 1992).

Specifically, at the time that the administrative judge issued the initial decision on November 15, 1991, the purported 30-day suspension period, effected July 1, 1991, had already elapsed.[10] *See* AF, Vol. 2, Tab 4, Subtabs 4c, 4b. Thus, as we explained in *McIntire*, such a suspension appeal presents a situation where there is nothing that an agency can do to effect interim relief, for the disciplined employee has returned to duty and been restored to the pay, compensation, and benefits of his position. *McIntire*, slip op. at 3-4. If, in such an instance, an agency were to retroactively cancel the completed suspension, such an action would render the appeal moot and thereby prevent the agency from filing a petition for review. *Id.* at 4; *Nickerson v. United States Postal Service*, 49 M.S.P.R. 451, 457-58 & n.7 (1991); *see also Malewich v. United States Postal Service*, 13 M.S.P.R. 548, 549-50 (1982). We will, therefore, consider the merits of the agency's petition. *See McIntire*, slip op. at 4.

---

[10] Here, moreover, inasmuch as no actual "suspension" was effected, the agency's satisfactory compliance with the administrative judge's interim relief order would have been even more problematical.

II. The merits of the petition.

The agency's petition is based on the erroneous premise that the administrative judge's finding that the appeal is within the Board's jurisdiction under 5 U.S.C. chapter 75 is correct. Inasmuch as this is an independent right of action appeal, however, the Board can either grant or deny "corrective action," based on whether the appellant has proven his claim of reprisal for engaging in whistleblower activity. *See Gergick*, 49 M.S.P.R. at 390-91. Thus, the appropriateness of the "penalty" imposed by the agency is not at issue. *Id.*

As the agency correctly asserts, the administrative judge erred by dismissing Charge 2 as a matter of law. PFRF, Tab 3 at 3-7. In its decision notice, the agency sustained Charge 2 only in part. AF, Vol. 2, Tab 4, Subtab 4c at 3. Citing *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990), the administrative judge found that the agency had therefore essentially failed to prove all of the specifications underlying Charge 2. ID at 8-9. In *Burroughs*, the Court of Appeals for the Federal Circuit held that the Board could not split a single agency charge into component parts, and then sustain only a portion of the original charge. The court did not suggest that the agency could not split its own charge, however. *Burroughs*, 918 F.2d at 172. We therefore find Charge 2 to be viable in this case.[11]

[11] In Charge 2, as modified by the agency's deciding official, the agency alleged that the appellant failed to

We find that the administrative judge's failure to adjudicate Charge 2 nonetheless did not prejudice the agency's substantive rights, and thus provides no basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). That is, the appellant's failure to show that his whistleblowing was a contributing factor to the agency's action renders the administrative judge's error harmless to the agency. *Id.*

We conclude that the appellant has failed to establish that the agency's action was based on reprisal for his whistleblowing activities. *See Gergick v. General Services Administration*, 43 M.S.P.R. 651, 659 (1990). Accordingly, we deny the appellant corrective action in this appeal.

ORDER

This is the final order of the Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

---

properly account for government property, i.e., surplus radios. AF, Vol. 2, Tab 4, Subtab 4c at 3.

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.